

INITIAL STATEMENT OF REASONS

Prior to January 1, 2012, the Meyers-Milias-Brown Act (MMBA) (Gov. Code, § 3500 et seq.) did not provide for mandatory impasse procedures, although allowing for voluntary mediation in section 3505.2 and authorizing local agencies to adopt additional dispute resolution procedures in section 3507. Assembly Bill 646 (Chapter 680, Statutes of 2011), while not changing the voluntary mediation provisions of section 3505.2, repealed the prior section 3505.4 and enacted new sections 3505.4, 3505.5, and 3505.7. Pursuant to Assembly Bill 646, the MMBA provides for a factfinding process that must be exhausted prior to a public agency's unilateral implementation of its last, best and final offer. (Gov. Code, § 3505.7.)

Under section 3505.4, in the absence of an agreement between a public agency and an exclusive representative, the employee organization may submit a request for factfinding to the Public Employment Relations Board (PERB or Board). This section further describes PERB's responsibilities with respect to the selection or appointment of the neutral chairperson of the factfinding panel, and the timelines that are applicable to the process.

The proposed regulation changes that have been identified as necessary for the implementation of PERB's responsibilities pursuant to Assembly Bill 646 are described below.

Section 32380 of the Board's regulations identifies administrative decisions that are not appealable. The proposed changes would, consistent with proposed section 32802, add a new paragraph identifying as non-appealable all determinations made with respect to the sufficiency of a factfinding request filed under section 32802. Consistent with existing Sections 32380 and 32793, which do not allow for appeals to the Board itself concerning impasse determinations under other statutes administered by PERB, such determinations would not be appealable to the Board itself under the MMBA. Section 32380 would also be revised to add MMBA section 3505.4 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32603 describes unfair practices by a public agency under the MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32603 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32604 defines employee organization unfair practices under the MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32604 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Proposed Section 32802 defines the process and timelines for filing a request for factfinding under the MMBA. The process and timelines are consistent with the express requirements and clear intent of the recent amendments to the MMBA (Chapter 680, Statutes of 2011), by which the Legislature identified the need to provide for a mandatory and uniform impasse procedure in order to make negotiations more effective. During the workshop process that preceded the adoption of emergency regulations, some parties advocated limiting the application of this regulation and MMBA factfinding to situations where the parties had first engaged in mediation. Based on the language of the MMBA, as amended by Assembly Bill 646, as well as evidence of legislative intent and the comments submitted by most other interested parties, this alternative approach has been rejected for purposes of the proposed regulations. Instead, it appears that harmonizing of the statutory changes made by Assembly Bill 646 requires the conclusion that factfinding is mandatory, if requested by an exclusive representative, for all local government agencies except those specifically exempted by Government Code section 3505.5(e).

It is correct that Government Code section 3505.4(a), as re-added by Assembly Bill 646, references a request for factfinding where “the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment.” However, Assembly Bill 646 also repealed the prior language of section 3505.4, which set forth under what conditions an employer could implement its last, best and final offer. In new section 3505.7, the MMBA provides that such an implementation may only occur, “After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders’ written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5.” (Emphasis added.) In order to harmonize the language of Section 3505.7 with that of 3505.4, and in order to provide clarity, PERB adopted proposed emergency regulations that provide for factfinding both where mediation has occurred, and where it has not.

This conclusion is also highly consistent with the available evidence of legislative intent. For example, the author of Assembly Bill 646 was quoted in the June 22, 2011 Bill Analysis, in relevant part, as follows:

Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed. Without impasse procedures, negotiations may not be fully effective, and bargaining may break down before all avenues for agreement are explored. Many municipalities and public agencies promulgate local rules which include impasse rules and procedures. However, this requirement is not uniform, and the lack of uniformity may serve to create confusion and uncertainty.

The creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process, by enabling the parties to employ mediation and fact-finding in order

to assist them in resolving differences that remain after negotiations have been unsuccessful.

Under proposed Section 32802, where parties have not reached an agreement, an exclusive representative may file its request with PERB, and must serve its request on the employer. If the parties have not agreed to mediate the bargaining dispute, and are not subject to a required mediation process adopted pursuant to MMBA section 3507, the request must be filed within 30 days of the date that either party has provided the other with written notice of a declaration of impasse. Where a mediator has been appointed or selected to help the parties to effectuate a settlement, the request may not be filed until at least 30 days after the date the mediator was appointed, but also not more than 45 days following that date. In either circumstance, the intent of the timelines in the proposed section is to allow the parties sufficient time to resolve their dispute on their own, without utilization of the statutory impasse procedure, but also to provide certainty for all parties as to the time within which a request for factfinding may be filed. This proposed section also describes the Board's process concerning such requests and specifies the timeframe within which the Board must act. Finally, the section provides that determinations regarding whether a request filed under this section is sufficient shall not be appealable to the Board itself, consistent with how impasse determinations under other statutes are treated.

Proposed Section 32804 defines the timeline and process for the appointment of a neutral chairperson of a factfinding panel, in cases where the Board finds a factfinding request to be valid. Consistent with the statute, PERB would not appoint a chairperson if the parties are able mutually to agree upon a chairperson. In order to assist the parties, PERB would provide for each sufficient request a list of seven names of neutrals from which the parties could select the chairperson, either by the alternate striking of names or other method upon which the parties agree. The parties would also be able to select any other person as the chairperson by mutual agreement. If the parties are unable to agree on a chairperson, PERB would appoint one of the persons on the list of seven as the chairperson. The number seven was specified in order to provide an odd number for purposes of the alternate striking of names, and based on PERB's normal practice in similar situations under other statutes, as well as the customary practice of many agencies that provide lists of neutrals to parties upon request. Consistent with the express provisions of the statute, the regulation also specifies that PERB shall not bear the costs for the chairperson under any circumstance.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

As discussed above, during the workshop process that preceded the adoption of the related emergency regulations, some parties advocated limiting MMBA factfinding to situations where the parties had first engaged in mediation. This alternative interpretation of Assembly Bill 646 was considered by PERB. However, based on the language of the MMBA, as amended by Assembly Bill 646, as well as the above-referenced evidence of legislative intent and the comments submitted by most other interested parties, this alternative interpretation was rejected for purposes of both the emergency and proposed regulations. PERB concluded, when adopting the emergency regulations, that harmonizing the statutory changes made by Assembly

Bill 646 required PERB to conclude that factfinding is mandatory, if requested by an exclusive representative, for all local government agencies except those specifically exempted by Government Code section 3505.5(e).

PERB fully intends to solicit further public comments and conduct a public hearing on these issues and interpretations in order to evaluate the possibility and strength of other alternatives through the regular rule making process.

ANTICIPATED BENEFITS OF THE PROPOSED REGULATIONS

These regulations and changes will improve the public sector labor environment and the collective bargaining process by providing additional dispute resolution procedures and promoting full communication between public employers, their employees and representatives in resolving disputes over wages, hours and other terms and conditions of employment. These regulations further the policy of bilateral resolution of public sector labor disputes. During a time in which many public employers, employees, and employees' representatives must address severe financial shortfalls, these regulations benefit all parties by providing procedural certainty to reduce further financial hardships and promote bilateral resolution of conflicts without disrupting essential public services. As an additional benefit, these changes will help PERB's constituents to avoid unnecessary and costly unfair practices and related litigation. Additionally, when public sector labor disputes are resolved in less costly ways, the community at-large benefits from those cost-savings.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

PERB has not identified any alternatives that would lessen any adverse impact on small business and has not identified any adverse impacts on small businesses as a result of these proposed regulations.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS RELIED UPON

PERB relied upon the Economic Impact Assessment prepared regarding the proposed regulations. PERB did not rely upon any other technical, theoretical, or empirical studies, report or documents in proposing the adoption of these regulations.

MANDATED USE OF SPECIFIC TECHNOLOGIES OR EQUIPMENT

PERB's proposed regulations do not mandate the use of any specific technologies or equipment.